

No. 11890

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

NATIONAL AMERICAN
FIRE INSURANCE
COMPANY OF OMAHA,

Appellant,

vs.

UNITED STATES OF
AMERICA,

Appellee.

APPEAL FROM
UNITED
STATES
DISTRICT COURT

—
HON. LEON R.
YANKWICH,
JUDGE

APPELLANT'S OPENING BRIEF

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FILED

JUN 23 1948

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Jurisdiction

(a) *Of the district court.* This action was filed in the district court by the plaintiff and appellant against the appellee, United States of America, under the Federal Tort Claims Act.¹ Under Sec. 931 of the Act, exclusive jurisdiction of such actions is vested in the district courts.

¹ Chapter 753, Title IV, Public Law 601, Sec. 401 *et seq.*; 28 U.S.C.A., Sec. 921 *et seq.* (August 2, 1946), hereinafter referred to as "the Act." Except where otherwise indicated, section references will be to the U. S. Code citation.

(b) *Of the Circuit Court of Appeals.* Appellant has taken this appeal from an order dismissing its action. Sec. 933 of the Act provides that final judgments in the district court are subject to review by appeal—

“(1) in the circuit courts of appeals in the same manner and to the same extent as other judgments of the district courts.”

The order dismissing the action was docketed on November 26, 1947, and the notice of appeal was filed February 24, 1948.

Statement of the Case

This is an appeal from an order of the court below dismissing plaintiff's complaint. The complaint alleges that plaintiff, a fire insurance company, insured a dwelling house in San Diego, California, against damage caused by aircraft or fire. While the policy was in force, an airplane belonging to the defendant, being piloted in a negligent manner by a commissioned officer in defendant's service, crashed into the house. The house was damaged and destroyed by the collision and resultant fire. It is also alleged that the proximate cause of the crash was the negligent manner in which the airplane was piloted and operated.

By reason of the damage and pursuant to the terms of the policy, plaintiff became obligated to and did pay its insureds, L. Chester Clark, and

Elizabeth A. Clark, the sum of \$3,800.00. The complaint prays damages from defendant in that amount.

Defendant's motion to dismiss was granted on the grounds:

1. That the complaint fails to state a claim against the defendant upon which relief can be granted.

2. That the Federal Tort Claims Act (28 U.S.C., Sec. 921 *et seq.*) does not authorize the maintenance of suits upon a derivative claim, and

3. That the Anti-Assignment Statute (31 U.S.C.A., Sec. 203) forbids this action which was brought by an insurance company, subrogee and assignee. (Tr. P. 17).

Specification of Errors

The District Court erred:

1. In holding that the complaint fails to state a claim against the defendant upon which relief can be granted.

2. In holding that the Act does not permit suits by Subrogees.

3. In holding that the Anti-Assignment Statutes (31 U.S.C.A., Sec. 203) which prohibits the assignment of claims against the United States is applicable to subrogated claims.

Argument

I. THE COMPLAINT STATES A CAUSE OF ACTION AGAINST THE DEFENDANT.

The complaint alleges ownership by defendant of the instrumentality causing damage, the operation by a commissioned officer in defendant's service, his negligence in its operation proximately causing the damage, and the amount of the damage. The complaint further alleges that plaintiff was the insuror of the property damaged and paid the sum claimed by reason of the damage.

The complaint further alleges that prior to the commencement of the action, L. Chester Clark and Elizabeth A. Clark assigned their claim to plaintiff to the extent of \$3,800.00, but, as will be pointed out later, this assignment is of no significance for the reason that upon payment of the loss, plaintiff was by operation of law, subrogated to the rights of its insured and the allegation of the assignment is mere surplusage.

II. BY ITS BROAD LANGUAGE THE ACT AUTHORIZES MAINTENANCE OF SUITS UPON DERIVATIVE CLAIMS.

A. THE PERTINENT PROVISIONS OF THE ACT

1. *Suits on tort claims.* Section 931 of the Act provides that suit may be brought against the Government in the district court on all claims whether for more or less than \$1,000.²

B. THE PLAIN MEANING OF THE ACT

Looking only at the words used in the Act and considering the question without reference to practical construction, the history of the Act or prior administrative rulings, it is submitted that the language used is so broad that it must be deemed to include subrogated claims. The Act confers jurisdiction on the district court to hear and render judgment "on any claim * * * under circumstances where the United States, if a private person, would be liable to the claimant for such damage * * *"; and further that the Government shall be liable for "such

² The pertinent portions of Sec. 931 of the Act provide: " * * * the United States district court for the district wherein the plaintiff is resident or wherein the act * * * complained of occurred * * * shall have exclusive jurisdiction to hear, determine and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent * * * act * * * of any employee of the Government while acting within the scope of his * * * employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage * * * in accordance with the law of the place where the act or omission occurred. * * * the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances * * *."

claims, to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances * * *."

As said by the Attorney General (36 Op. Atty. Gen. 553) in ruling that similar language in a prior tort claims statute (31 U.S.C.A., Sec. 215), commonly referred to as the "Small Tort Claims Act" included subrogation claims:

"Assuming that such a statute is to be strictly construed because in derogation of the immunity of the sovereignty, a strict construction does not permit reading into the statute something that is not there or disregarding its plain terms. The words of the statute include all claims and all claimants."

In view of this Court's decision in *Employers' Fire Insurance Company, etc. v. United States of America, Charles Rusconi, et al*, No. 11,743, decided April 8, 1948, we feel it would be an unnecessary infringement upon the Court's time to further extend this brief on the points therein decided, since it has been squarely held by this Court that the Act authorizes suits upon derivative claims.

III. THE ANTI - ASSIGNMENT STATUTE (31 U.S.C.A., SEC. 203) IS INAPPLICABLE TO SUBROGATED CLAIMS.

This section provides—

"All transfers and assignments made of any claim upon the United States * * * shall be absolutely null and void * * *."

This Court has held in the Rusconi case (*Supra.*) that this statute does not apply to transfer of title by operation of law.

Prior to the commencement of this action plaintiff's insureds assigned their claim to plaintiff to the extent of the amount paid by plaintiff. This, however, was an idle act and of no significance and the pleading of this assignment should be treated as surplusage. Plaintiff's claim against defendant arose by operation of law. It was complete and a cause of action existed at the moment of payment (*Offer v. Superior Court*, 194 Cal. 114, 228 Pac. 11).

Respectfully submitted,

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